



**Attain Enterprise Solution Limited v Sacco Societies Regulatory Authority  
& another (Miscellaneous Civil Application E485 of 2021) [2021]  
KEHC 53 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 53 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E485 OF 2021  
DAS MAJANJA, J  
SEPTEMBER 23, 2021**

**BETWEEN**

**ATTAIN ENTERPRISE SOLUTION LIMITED ..... APPLICANT**

**AND**

**SACCO SOCIETIES REGULATORY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**DEVELOPMENT BANK OF KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the Notice of Motion dated 25<sup>th</sup> June 2021, the Applicant has invoked section 7 of the Arbitration Act, 1995 seeking an interim order of protection in the nature of a temporary injunction restraining the Respondents from enforcing the bank guarantee (performance security) No. GDBK/2019/084O/B ATTAIN ENTERPRISE SOLUTION LIMITED issued by Development Bank of Kenya Limited pending referral of the dispute between the Applicant and the 1<sup>st</sup> Respondent to arbitration. It also seeks an order that the 1<sup>st</sup> Respondent be compelled to immediately deposit the reminder of the contract sums with the advocates for the Applicant to hold as stakeholder pending hearing and determination of the intended arbitration.
2. The application is supported by the affidavit of Brian Kili, the Applicant's Managing Director, sworn on 22<sup>nd</sup> June 2021 and a further affidavit sworn by Kenneth Motende, the Managing Director, sworn on 2<sup>nd</sup> September 2021. It is opposed by the 1<sup>st</sup> Respondent through the replying affidavit its Acting Chief Executive Officer, Peter Njuguna, sworn on 28<sup>th</sup> July 2021 and the 2<sup>nd</sup> Respondent ("the Bank") through the replying affidavit of its Credit Officer, Kenneth Mutai, sworn on 23<sup>rd</sup> August 2021. All the parties filed written submission in support of their respective positions.



3. The facts as set out in the respective depositions are fairly straight forward. 1<sup>st</sup> Respondent advertised a tender for the Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of a Risk Based Supervision System, Electronic Document Management System and Related Hardware Infrastructure. After the evaluation process, the Joint Venture made up of the Applicant, Jo World Agencies and Science Soft OY was declared successful. Subsequently, a comprehensive contract was executed on 21<sup>st</sup> February 2020 between the parties.
4. In order to guarantee the performance of the Applicant's joint venture obligations under the contract, the Applicant took out a bank guarantee/ performance bond ("Guarantee") from the Bank in the sum of KES. 20,842,287.00 valid upto 19<sup>th</sup> December 2020 in favour of the 1<sup>st</sup> Respondent.
5. The contract commenced on 21<sup>st</sup> February 2020 and was to be completed within 6 months, that is, by August 2020. The Applicant failed to complete the project by September 2020. It is the reason for failure to complete that the parties are in dispute. In the meantime, the validity period for the Guarantee was extended to 21<sup>st</sup> June 2021 by the Bank.
6. Since the joint venture failed to perform their obligations under the contract, the 1<sup>st</sup> Respondent called for the Guarantee causing the Applicant to file this application and seek interim relief. It is not in dispute that the contract between the Applicant and 1<sup>st</sup> Respondent contains an arbitration clause.
7. The issue for determination is whether the Applicant has made out a case for the grant of an interim measure of protection under section 7 of the Arbitration Act, 1995. It provides as follows:

7. Interim measures by court

- (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
- (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

8. The leading case in which the Court of Appeal outlined the principles governing the grant of interim measures of protection is *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others Civil Application No. NAI 327 of 2009 [2010] eKLR* where Nyamu JA., observed as follows;

By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as "interim measures of protection" under section 7 of the *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*. On the other hand, in the English version of the ICC Rules for example, they are known as "interim conservatory measures". Whatever their description however, they are intended in principle to operate as "holding" orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.



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Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.
  2. Whether the subject matter of arbitration is under threat.
  3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
  4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties. [Emphasis mine]
9. From the facts I have outlined, this case revolves around the 1<sup>st</sup> Respondent's decision to call in the Guarantee. As the Applicant submits, it and the 1<sup>st</sup> Respondent have two conflicting positions on whether and to what extent parties to the contract fulfilled their contractual obligations. The dispute between them revolves around whether the Applicant completed the contract as scheduled and whether in fact, there were good reasons for termination of the contract. The 1<sup>st</sup> Respondent states that it gave the Applicant numerous opportunities to deliver the project and when it failed to do so, it contacted the Joint Venture partners who denied that they were part of the consortium. The 1<sup>st</sup> Respondent referred the matter for investigations to the police.
10. The Applicant's position is that it was unable to work on schedule due to the COVID-19 pandemic. It asserts that it has completed a substantial part of the work and only failed to do so because the 1<sup>st</sup> Respondent's officers were not available to ensure that the project was completed. The Applicant accuses the 1<sup>st</sup> Respondent of violating engagement protocols by calling its Joint Venture partners and in any case, the internal working of the Joint Venture, were not within its mandate. It states that at all material times, it has been ready and willing to engage with the 1<sup>st</sup> Respondent to complete the contract.
11. In response to the application, the Bank admits that the 1<sup>st</sup> Respondent called in the Guarantee by the letter dated 18<sup>th</sup> June 2021 on the grounds of non-performance. While it admits that it is under an obligation make payment upon demand, it asserts that in view of the allegations of fraud uncovered by the 1<sup>st</sup> Respondent in respect of the Joint Venture, the Guarantee is null and void as it was procured by fraud.
12. I have considered the arguments laid out in the submissions. In resolving this matter, the court is required to exercise circumspection in commenting on or making findings on the merits of the case in a manner that would prejudice the decisional independence of the arbitral tribunal. In the Safaricom Ltd Case (Supra), the Court of Appeal observed that:

In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the Arbitration Act. A court



of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration.

13. In relation to the object of granting interim measures of protection, the same position was emphasized by the court in *Cetelem v Roust Holdings [2005] EWCA civ 618* as follows:

(71) ..... The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is arbitration on foot ..... Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertaking from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators.

14. It is important to note that the dispute subject of the arbitration proceedings is between the Applicant and the 1<sup>st</sup> Respondent concerning performance of the contract. It is separate from the Guarantee which is between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The nature of payment guarantees, performance bonds and like documentary credit documents has been the subject to several decisions including *Sinohydro Corporation Limited v GC Retail Limited and Another*, *Saj Ceramics v HMS Bergabau AG and Another*, *Transfrica Assurance Co., Ltd v Cimbria (EA) Ltd [2002] 2 EA 627* and *Kenindia Assurance Co., Ltd v First National Finance Bank Limited*. These decisions hold that a Performance Bond or Guarantee is a contract independent of the primary contract. Lord Denning MR in *Edward Owen Engineering Limited v Barclays Bank International Limited [1978] 1 All ER 976* explained this principle as follows;

A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honor the credit.

It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade. [Emphasis mine]

15. The Guarantee issued by the Bank provides that it would undertake to pay to the 1<sup>st</sup> Respondent, upon their first written demand declaring the Applicant to be in default under the contract and without proof of default, cavil or argument or condition the amount guaranteed. It follows that the liability of the Bank became due when the 1<sup>st</sup> Respondent issued and the Bank received the letter of demand dated 18<sup>th</sup> June 2021 while the Guarantee was still valid.
16. The Applicant, not being party to the Guarantee cannot restrain the Bank from performing its contractual obligation to the 1<sup>st</sup> Respondent. On the other hand, the Bank suggests that the Guarantee is in fact null and void for the reason that one of the Joint Venture partners denied involvement in the Joint Venture. The Bank correctly points out that it is entitled to avoid the Guarantee on grounds of fraud. It cites *British Imex Industries Limited v Midland Bank Limited [1957] 2 Lloyd's Rep. 591*. It urges that the 1<sup>st</sup> Respondent cannot approbate and reprobate by alleging fraud on the one hand and calling in the Guarantee issue on the basis of an agreement it now impugns.
17. This court will not comment on what is the position regarding the Joint Venture as these are proceedings for an interim measure of protection sought by the Applicant. The Bank does not have



any right of relief against the 1<sup>st</sup> Respondent or the Applicant and neither can it seek to avoid its legal obligations in these proceedings. Likewise, the 1<sup>st</sup> Respondent does not have any right of relief against the Bank in these proceedings. On this, I say no more on this issue.

18. Ultimately under section 7 of the Arbitration Act, the court is called upon to protect the subject of arbitration. The Guarantee is a separate and independent agreement between the Bank and the 1<sup>st</sup> Respondent. It is not the subject matter of the arbitration. The arbitral tribunal will not adjudicate on the Guarantee. Consequently, I refuse to grant an injunction as prayed in that regard.
19. The other prayer sought by the Applicant is for the 1<sup>st</sup> Respondent to deposit the amount due under the contract between the Applicant and the 1<sup>st</sup> Respondent with the Applicant's Advocates holding it as stakeholder. This prayer is in the nature of a mandatory injunction and I think it would be proper to draw on the established principles that have guided the court in issuing mandatory orders. It is accepted that while the court may grant a mandatory injunction at an interlocutory stage, it will not normally be granted unless there are special or exceptional circumstances. These special circumstances include a case that is clear and one which the court thinks ought to be decided at once by a simple and summary act that can be easily remedied, or if the defendant attempted to steal a march on the plaintiff (see *Kenya Breweries Limited and Another v Washington Okeyo NRB CA Civil Appeal No. 332 of 2000 [2002] eKLR* citing *Halsbury's Laws of England* and *Locabail International Finance Ltd v Agroexport and others* ER 901).
20. In reaching the conclusion whether the balance of the money due under the contract should be deposited as suggested, the court would have to weigh the respective merits of the case and make a determination on the contentions put forth by the parties. This would of necessity, drag the court into the arbitral tribunal's decision making authority.
21. In conclusion, I find and hold that the Applicant has not made out a case for the grant of an interim measure of protection laid down in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (Supra)*. The Notice of Motion dated 25<sup>th</sup> June 2021 is dismissed with costs to the Respondent. The interim orders in force are hereby discharged forthwith.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Ndeda instructed by Conrad Law Advocates LLP for the Applicant

Mr Kihara instructed by Kihara and Wayne Advocates for the 1<sup>st</sup> Respondent

Mr Akello instructed by Robson Harris Advocates LLP for the 2<sup>nd</sup> Respondent

